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AUG 4 1953
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SUPREME COURT OF THE UNITED STATES
October Term 1953 No. 234

GORDON E. STRUCK :

Petitioner :

v. : PETITION FOR WRIT OF CERTIORARI

THE UNITED STATES OF AMERICA :

TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Petition for Writ.....	1
Statement.....	2
Jurisdiction.....	8
Question Presented.....	9
Reasons Relied on for Allowance of Writ.....	10

CITATIONS

Cases

REMINE v. U.S. (161 Fed. 2nd 1020).....	10
WALLACE v. U.S. (174 Fed. 2nd 112).....	11
ODDO v. U.S. (171 Fed. 2nd 854).....	11

Rules

Fed. Rules of Crim. Proc. (40)(3).....	2
Fed. Rules of Crim. Proc. 37(a)(2).....	4,10,11,12
Fed. Rules of Crim. Proc. 39(c).....	7

Statutes and Constitution

Title 28 U.S.C. Sec. 2253.....	3
Title 28 U.S.C. Sec. 1254.....	8
Fifth Amendt. to U.S. Constitution.....	14

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TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on July 6, 1953, which granted the Government's motion to dismiss the appeal to said United States Court of Appeals for the Fifth Circuit from a judgment of conviction entered against the appellant herein, in the District Court for the Northern District of Alabama (Western Division), on April 27, 1953.

(A) STATEMENT

The defendant was indicted in the United States District Court for the Northern District of Alabama (Western Division), on four (4) counts, charging him with mailing obscene matter in 1951 from various locations, in Queens, New York, located in the Eastern District of New York, divers Post Office addresses in the Northern District of Alabama.

A warrant for the defendant's removal from the Eastern District of New York to the said Northern District of Alabama was issued, and he was arrested at his home and place of business, in Queens, New York, on or about the 25th day of October, 1951. The removal proceedings were contested by the defendant throughout the entire case. A hearing was held before the HON. EDWARD R. FAY, United States Commissioner, who held the defendant for removal, pursuant to Rule 40 (3) of the Federal Rules of Criminal Procedure. Thereupon, the petitioner sued out a Writ of Habeas Corpus returnable before the District Court for the Eastern District of New York. At the conclusion of the hearing thereof, the defendant was held for removal. Thereafter defendant appealed from the order of removal to the Court of Appeals for the Second

Circuit. The said Court of Appeals for the Second Circuit affirmed the order of removal, on the grounds that no appeal from such order is permissible, pursuant to the Provisions of Title 28 USCA Section 2253 taking away the right of appeal from an order holding one for removal.

Thereafter, the appellant applied to the HON. JUSTICE JACKSON, Associate Justice of the Supreme Court of the United States for an order continuing him on bail pursuant to a Writ of Certiorari to review the judgment of the Circuit Court affirming the order of the District Court. This application was denied: and on or about the 20th day of June, 1953, the defendant thereafter appeared in the District Court pursuant to the Mandate directing his being surrendered to the United States Marshal of the Eastern District of New York for purposes of transportation pursuant to the terms of the warrant issued out of the District Court for the Northern District of Alabama. (See record of minutes of said surrender).

Shortly thereafter, the defendant was produced by the United States Marshal, in the said District Court of Alabama at which time he entered a plea of not guilty, was admitted to bail by the said trial court, and released, and permitted to return to his home, in Queens, New York.

Subsequently thereto, and memo adjournments,

the defendant was tried in the District Court of Alabama, Western Division, and convicted by a jury, on or about the 27th day of April, 1953, on all counts of the indictment. He was immediately sentenced, by the Court, the Judge stating, on the record (R. 44), that inasmuch as the trial attorney has indicated his intention to file a notice of appeal, he would allow appellant out on an appeal bond of $1,000.00. Said bail bond was posted within a few hours, and the appellant was released. He had the assurances of his trial counsel that an appeal would be filed. He returned to his home, in Queens, New York. Three weeks later the appellant received a Registered letter enclosing a certified copy of an order signed by the same said District Judge who had allowed him on appeal bail upon motion of the United States Attorney, indicating that he must surrender himself to the custody of the said United States Marshal for the said Alabama District Court for the Northern District of Alabama, owing to the failure to file a written Notice of Appeal pursuant to Rule 37 of the Federal Rules of Criminal Procedure, and he was instructed to commence service of his sentence of one year and one day which was imposed on him on the 27th day of April, 1953.

Thereafter, the defendant sought the advice and help of counsel herein who was advised by the appellant that although the trial attorney had been

authorized and instructed to appeal, and had stated to the appellant that he would do so, and had aided the appellant in procuring an appeal bond, and had stated to the trial judge, and set forth in the said minutes of his sentencing, that he would file a notice of appeal, said attorney failed to do so.

That, thereafter, counsel herein on or about the 10th day of June, 1953, did cause to be served and filed a notice of appeal to the Clerk of the said District Court of Alabama, indicating an appeal would be taken to the Court of Appeals for the Fifth Circuit. The fee was tendered to the Clerk of the District Court and accepted by him. Thereafter, on or about the 23rd day of June, 1953 the appeal fee of $25.00 was paid to the said Court of Appeals for the Fifth Circuit and the appeal was docketed. Subsequently thereto, the District Attorney made a motion returnable in said District Court to dismiss said appeal on the grounds that it had not been timely taken, pursuant to Rule 37 of the Rules of Criminal Procedure.

Counsel submitted affidavits of the appellant and counsel in opposition to the said motion to dismiss, clearly setting forth the entire history of the question of the appeal and the failure of the said trial attorney to file his written Notice of Appeal. No sworn statements contradicting the allegations of appellant's affidavit were ever submitted to the said Court of Appeals.

Counsel for the appellant was never served with any affidavits contending that the appellant's assertions or statements were untrue. Rather, the District Attorney merely relied on the failure to file within the prescribed period.

The appellant had returned to his home, after having been released on bail, trusting his trial counsel fully. The trial attorney was a local experienced attorney. He had assured the appellant that everything necessary would be done to protect his interests, and that an appeal would be taken. The appellant certainly had reasonable grounds to rely thereon. He returned to his home approximately 1,010 miles away, believing the appeal was being diligently prosecuted. He first learned the contrary when he received the order above referred to directing him to surrender himself.

While the said motion for a dismissal of the appellant's appeal in the Court of Appeals for the Fifth Circuit was pending, appellant made a motion to be continued on bail pending the determination of said appeal. He had already received an extension of time to surrender himself, but the time of said extension was fast running out. Counsel for the Appellant herein was advised by the Clerk of the said Court of Appeals for the Fifth Circuit that the appellant's motion for bail could not be taken by the Court unless the full Court could hear the motion, and until the record had been filed. At the time of such determination, the appellant had time to file his record with the Clerk of the Court of

Appeals for the Fifth Circuit, pursuant to Rule 39(c) of the Federal Rules of Criminal Procedure which allowed said record to be docketed within forty (40) days from the date the notice of appeal was filed in the District Court. The said Court of Appeals for the Fifth Circuit dismissed said appeal by its judgment duly made and entered on the 6th day of July, 1953.

The motion returnable in the said Court of Appeals for the Fifth Circuit allowing the appellant therein an appeal, not being taken by the Court, nd the said appeal being dismissed as aforementioned, the appellant had no recourse, owing to lack of time, to do ought, but to obey the Mandate of the District Court and commence service of his sentence. He had difficulty in obtaining transportation to Alabama, from Queens, New York, owing to the July 4th holiday weekend rush. However, he did fly from Queens, New York, to Birmingham, Alabama, on the night of the 6th day of July, 1953, and surrendered himself into the custody of the Marshal in Alabama, on the 7th day of July, 1953, to commence service of his sentence.

(B) JURISDICTION

The Supreme Court of the United States has jurisdiction to review the judgment of the Court of Appeals under United States Code, Title 28, section 1254. The judgment of the Court of Appeals was entered the 6th day of July, 1953 (Trans. p. 35), and this petition is filed August 4, 1953.

(C) QUESTION PRESENTED

The question presented by the petition is:

> Whether the appeal taken by the Petitioner from the judgment of conviction entered against him in the District Court for the Northern District of Alabama (Western Division) should have been dismissed by the Court of Appeals for the Fifth Circuit on the grounds that the appeal was not timely taken pursuant to the provisions of Rule 37 (a)(2), of the Federal Rules of Criminal Procedure.

(D) REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. A conflict exists between the decisions of the Courts of Appeals for the Sixth, the Eighth, the Second and the Fifth Circuits, respectively, on the first question presented by this petition. In the Sixth Circuit, the Court of Appeals has held that the provisions of said Rule 37(a)(2), of the Federal Rules of Criminal Procedure, could not be strictly enforced against an appellant in a United States penitentiary twenty-six hundred (2600) miles away from the Court in which he had been convicted. In this case the appeal was allowed and the judgment entered against the appellant was corrected, and then affirmed. The Court, by a Per Curiam decision, ruled that timeliness could not be reasonably required of the appellant.

BEHRIE v. UNITED STATES OF AMERICA
No. 10364
161 Fed. 2nd 1020, C.A. 6th
Cert. Den. 67 S. Ct. 1759

The Court of Appeals for the Eighth Circuit took jurisdiction of an appeal from an order denying an appellant's motion to vacate a sentence, although the notice of appeal from said order was dated June 8, 1948 and not filed until June 23, 1948 by the Clerk of the District Court. The appellant therein did not know of

the entering of the said order until the 3rd day of June, 1948: and on the 8th day of June, 1948, he sent his notice of appeal to the Clerk of the District Court. The appellant therein had been misinformed by the said District Court Clerk of the time limit within which to file his notice of appeal.

WALLACE v. UNITED STATES OF AMERICA
174 Fed. 2nd 112, C.A. 8th
Cert. Den. 69 S. Ct. 1505

The Court of Appeals for the Second Circuit allowed an appeal received by the Clerk of the District Court for the Southern District of New York, on March 29, 1948, although the order denying a motion to vacate part of the appellant's sentence, was entered March 15, 1948.

The appeal fee was received on the 7th day of April, 1948, by the said Clerk of the District Court: who then filed the notice of appeal.

The appeal being allowed by the said Circuit Court for the Second Circuit, the Court of Appeals then ruled on the merits of the appeal.

CODO v. UNITED STATES OF AMERICA
171 Fed. 2nd 854, C.A. 2d
Cert. Den. 69 S. Ct. 1498 (337 U.S. 943)

The judgment sought to be reviewed herein contains, principally, the following matter: That the appeal to the said Court of Appeals for the Fifth Circuit was not taken within ten (10) days after entry of the judgment, pursuant to the provisions of said Rule 37(a)(2) of the Federal Rules of Criminal Procedure.

It is apparent that, although the provisions of said Rule 37(a)(2) of the Federal Rules of Criminal Procedure provide that "an appeal by a defendant may be taken within ten (10) days after entry of the judgment or order appealed from,...", the said Court of Appeals for the Fifth Circuit has construed and interpreted the provisions of said Rule to mean that an appeal must be taken within ten (10) days from the said order or judgment from which relief is sought.

In addition to the creation of conflict in a realm of criminal law, which the aforementioned decisions created, there must be borne in mind the desirability and necessity of allowing the appellant his day in court. The Petitioner herein has suffered grievous harm, through no fault of his own. He was compelled to stand trial in a court located more than one thousand miles away from his home and place of business. He was convicted, and then instructed his attorney to file a notice of appeal. He was assured this would be done by the attorney, and the Petitioner was released on a bail bond. He returned to his home, a great distance from the Court. Although he had contested the removal proceedings which directed that he be brought to the said Alabama District Court to stand trial, on the grounds that the said Alabama District Court did not have jurisdiction of anything done within the boundaries of the District Court for

the Eastern District of New York, and although he was removed by a United States Marshal, instead of filing an appearance bond in the removal proceedings so as to avoid his being transported by the authorities to Alabama, his rights were jeopardized by the failure of the said local counsel in Alabama to file a written notice of appeal, pursuant to the rules and statutes appurtenant thereto. This, despite the learned District Judge in the Trial Court clearly stating (Trans. p. 44) that "Your attorney, Mr. Matt Murphy, Jr., has said that you would desire to file notice of appeal ....".

It is respectfully submitted, that, in counsel's humble opinion, the Court of Appeals for the Fifth Circuit should not have granted the motion to dismiss the appeal from the said judgment of conviction in the Alabama District Court.

The question herein involved is a substantial one.

In dismissing the appeal from the judgment of conviction herein, the said Court of Appeals for the Fifth Circuit has ruled contrary to the said decisions of the aforementioned other Courts of Appeal for the various circuits on the question of relaxing rules in the case of defendants who have not been at fault in prosecuting their appeals. The Court of Appeals for the Fifth Circuit has not given the rules a liberal interpretation for the benefit of an appellant who is a victim of circumstances beyond his control, as have the other Courts of Appeals for the respective circuits.

This has resulted in the petitioner's being deprived of his liberty without due process, in violation of the Fifth Amendment to the Constitution of the United States.

The decision of the Court of Appeals present a question of fundamental importance in constitutional law and Federal Criminal Practice which should be decided by the decision of this Court.

The Petitioner therefore respectfully requests that this petition for a Writ of Certiorari be granted.

Dated: Brooklyn, New York,
August 4, 1953.

Attorney for Petitioner

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Rules involved	2
Statement	3
Argument	5
Conclusion	6

Cases:

Crow v. *United States*, 203 F. 2d 670	5
Cuckovich v. *United States*, 170 F. 2d 89, certiorari denied, 336 U.S. 905	5
Huff v. *United States*, 192 F. 2d 911, certiorari denied, 342 U.S. 946	5
McIntosh v. *United States*, 204 F. 2d 545	4
Marion v. *United States*, 171 F. 2d 185, certiorari denied, 337 U.S. 944	5
Oddo v. *United States*, 171 F. 2d 854, certiorari denied, 337 U.S. 943	5
Remine v. *United States*, 161 F. 2d 1020, certiorari denied, 331 U.S. 862	5
Swihart v. *United States*, 169 F. 2d 808	5
United States v. *Froehlich*, 166 F. 2d 84	6
Wallace v. *United States*, 174 F. 2d 112, certiorari denied, 337 U.S. 947	5

Rules:

37, F. R. Crim. P.	2, 5
45(b), F. R. Crim. P.	2, 5

writ of certiorari was filed on August 4, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the Court of Appeals erred in dismissing petitioner's appeal on the ground that it was not filed within ten days after judgment in accordance with Rule 37(a)(2) of the Federal Rules of Criminal Procedure.

RULES INVOLVED

Rule 37, F. R. Crim. P., provides in pertinent part:

> (a) Taking Appeal.
>
> (1) *Notice of Appeal.* An appeal permitted by law from a district court * * * to a circuit court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. * * *
>
> (2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from * * *.

Rule 45(b) provides:

> When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally

prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

STATEMENT

Petitioner was charged in an indictment in four counts in the United States District Court for the Northern District of Alabama with mailing lewd photographs from Far Rockaway, New York, to Centreville, Alabama (R. 4-6). On April 27, 1953, the jury found him guilty on all four counts, and the trial court sentenced him to imprisonment for one year and a day (R. 2, 43-44). At the time of sentencing the trial judge stated to petitioner, "Your attorney, Mr. Matt Murphy, Jr., has said that you would desire to file notice of appeal, and I told him that I would fix the appearance bond on appeal at $1,500 * * *" (R. 44). The required appeal bond was filed and petitioner returned to his home in New York (R. 2, Tr. 11).

On June 5, 1953, over a month after the District Court's judgment, petitioner's notice of appeal was presented to the clerk of the District Court, who did not file it until June 10, when the required filing fee was received (Tr. 9). On June 23, the United States Attorney moved to dismiss the appeal on the ground that it had not been taken within the ten-

day period prescribed by Rule 37(a)(2), F. R. Crim. P. (Tr. 4-5).

Petitioner (Tr. 10-13) and his New York attorney (Tr. 14-26) filed affidavits in opposition to the motion to dismiss the appeal, stating that failure to file a timely appeal was due to the negligence of local counsel. Petitioner alleged that when he was sentenced on April 27, 1953, he instructed his local Alabama counsel to appeal from his conviction; that his counsel said he would do so; that petitioner posted his appeal bond and returned to New York (Tr. 11); that petitioner first learned of his local counsel's failure to file a notice of appeal on May 21 when he received from the trial judge by registered mail a copy of an order directing him to surrender for service of sentence; that petitioner was unable to reach his local counsel until May 23, at which time his counsel admitted in a long distance telephone conversation that he had not filed the notice of appeal; that the failure to file the notice of appeal was due entirely to local counsel's negligence and was without petitioner's approval (Tr. 12).

On July 6, 1953, the Court of Appeals dismissed the appeal on the authority of *McIntosh* v. *United States*, 204 F. 2d 545 (C.A. 5), "[i]t appearing from the motion to dismiss, the attached Clerk's certificate, and from the affidavits in opposition thereto, that no appeal was taken within ten days after entry of the judgment as permitted by Rule 37(a)(2) of the Federal Rules of Criminal Procedure" (Tr. 35).

ARGUMENT

It is clear that the Court of Appeals had no choice but to dismiss petitioner's appeal since, under Rule 45(b) of the Federal Rules of Criminal Procedure, there can be no enlargement of the time for appeal fixed by Rule 37(a)(2), even for excusable neglect. The filing of the notice of appeal within the ten-day period is jurisdictional, and in the absence of compliance therewith, the appeal must be dismissed. *Huff* v. *United States*, 192 F. 2d 911, 912-914 (C.A. 5), certiorari denied, 342 U.S. 946; *Marion* v. *United States*, 171 F. 2d 185, 186 (C.A. 9), certiorari denied, 337 U.S. 944; *Swihart* v. *United States*, 169 F. 2d 808 (C.A. 10).

Petitioner relies upon a group of cases, where, on motion to correct or vacate sentence brought by convicted prisoners acting without counsel, courts have held that the time for appeal did not commence to run until the prisoner received notice of the adverse judgment or order pursuant to Rule 49(c). *Remine* v. *United States*, 161 F. 2d 1020 (C.A. 6), certiorari denied, 331 U.S. 862; *Wallace* v. *United States*, 174 F. 2d 112 (C.A. 8), certiorari denied, 337 U.S. 947; *Oddo* v. *United States*, 171 F. 2d 854 (C.A. 2), certiorari denied, 337 U.S. 943 (Pet. 10-11). None of these cases is apposite. Petitioner, who was present when he was sentenced, obviously knew of the entry of the judgment, and he was in fact represented by an attorney. Cf. *Crow* v. *United States*, 203 F. 2d 670, 671-672 (C A. 9); *Cuckovich* v. *United States*, 170 F. 2d 89, 91 (C.A.

6), certiorari denied, 336 U.S. 905; *United States* v. *Froehlich*, 166 F. 2d 84 (C.A. 2).

CONCLUSION

This case was decided upon established legal principles, and no conflict in decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1953.

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